85-149

NO.

Office-Supreme Court, U.S.
FILED
JUN 21 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THOMAS E. HARNEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERROLD M. LADAR
Attorney At Law
507 Polk Street, Suite 310
San Francisco, CA. 94102
Telephone: (415) 928-2333

Counsel for
THOMAS E. HARNEY

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QUESTION PRESENTED

Whether a detention imposed at gunpoint by federal agents for the purpose of effecting an arrest upon less than probable cause may be upheld under Terry v. Ohio, 392 U.S. 1 (1968) if founded suspicion exists at the moment of detention.

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Thomas E. Harney petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The memorandum opinion below of the

court of appeals (App. A., *infra*) is not reported.

JURISDICTION

The opinion of the court of appeals was filed on April 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

Petitioner ("Harney") was convicted, after a court trial in the United States District Court for the Southern District of California, of one count of violating 21 U.S.C. §§ 841 (a)(1), (b)(6) and 846 - possession with intent to distribute marijuana. He was

sentenced to a period of incarceration and is at liberty pending determination of this Petition.

The non-jury trial was conducted on the basis of stipulated facts, which stipulation recites portions of the transcript of a hearing on a motion to suppress conducted by the District Court on August 16, 1984 (Cited as "RT __") After that evidentiary hearing was completed, Harney, and the co-defendants, made motions to suppress (discussed infra)which were granted in part and denied in part. The stipulated facts trial then proceeded on the evidence that survived the suppression motions. The "stipulation" was filed in the District Court, below, as docket entry 1199. It is cited herein as "Stip p.___" and is

submitted herewith as App., infra. This is a search and seizure case arising out of the importation of marijuana from Mexico into the United States via a vessel, the "Andiamo", which arrived in San Diego on June 5, 1983.

Harney, the owner of the Andiamo, and other persons were subjected to surveillance which on June 11, 1983 resulted in their arrests and in the searches of several things and areas. In District Court, Harney's motions to suppress were granted with three exceptions: the court upheld searches pursuant to search warrants of (1) the Andiamo, (2) a Ford van, and (3) Harney's hotel room. All three of the search warrants were based on information obtained from one Hans Larsson

("Larsson") who was arrested with Harney and who subsequently cooperated with law enforcement. Larsson's statements and the marijuana and other items seized from the van and the Andiamo were the basis of Harney's conviction.

The issue in this case is whether or not the information obtained from Larsson was illegally seized.

We submit that the Larsson statements are fruits of the illegal seizure of the van, driven by certain co-defendants, when it was stopped at an immigration checkpoint north of San Diego. The fruits of that stop lead directly to the arrest of Larsson who, at the time the van was being stopped, was with Harney in downtown San Diego. If the stop of the van is ruled to have been

illegal, then the arrest of Larsson would also be illegal and his statements would be suppressed, thus resulting in the suppression of all of the evidence seized pursuant to the search warrants.

The District Court held that Harney had standing to object to the warrantless seizure of the van, which it held to have been illegal, but that Harney lacked standing to object to the subsequent search of the van, pursuant to search warrant, because that search warrant was based on Larsson's statements, statements which, the District Court found, were not fruits of the illegal seizure of the van. (See, App. B, infra.)

The Ninth Circuit, disapproving of the District Court's analysis, held that the stop of the van need not have been

the justification for the stop of Larsson/Harney because both the stop of the van and the Larsson/Harney stop were proper "Terry" stops which were justified by the results of a search of a certain hotel room and the overall activities observed throughout the period of surveillance.

We submit that in viewing the totality of the circumstances, the three search warrants in question were based on the fruits of the illegal seizure of the van.

The facts are as follows:

Harney owned a sailing vessel, the "Andiamo". (Stip pp. 17-18) Harney, and the Andiamo, were in Panama in February 1983 where he met Hans Larsson. (Stip p. 18) Harney offered Larsson passage to the

United States in exchange for Larsson's agreement to work as a deck hand. Larsson agreed. On the way to the United States, Harney, Larsson and the Andiamo stopped in Colombia and loaded marijuana on board. (Stip p. 19)

On June 5, 1983, they arrived in San Diego. (Stip p. 20) Larsson observed and assisted in the sale by Harney of some of the marijuana that had been transported by the Andiamo. The next day, Harney rented a brown Torino, California license number 064NCC (the "Torino"). On June 7, 1983, Harney rented a 1983 Ford van, California license number 2E00611 (hereinafter "the van"). (Stip p. 10) On June 8, 1983, Harney rented rooms 509 and 512 at the Roadway Inn in San Diego. (Stip p. 7) On June 8, 1983, Jamie

Bonilla rented a red Ford, California license number IZZ202 (the "red Ford"). (Stip p. 9)

On June 9, 1983, narcotics officers observed Robert Loop, Leo Mangan, Bruce Doll and William Smith walking through the PSA airline terminal in San Diego. The agents became suspicious and followed.

After unsuccessfully attempting to rent a car, Loop, Mangan, Doll and Smith went to the Roadway Inn. (Stip p. 3) They then took a taxi to the Sheraton Harbor Island Inn, which was nearby. All four entered the Sheraton, but Smith soon exited and took a cab to Ajax Rental Car where he rented a brown Pontiac station wagon, California license number 1BTY476 (the "Pontiac station wagon"). (Stip pp.

4-5) He then drove it back to the Sheraton. Several hours later, Smith and Loop drove the Pontiac station wagon to the Roadway Inn and parked it in the underground garage. (Stip pp. 8-9)

The next day, June 10, 1983, when surveillance was resumed, the Pontiac was back at the Sheraton and Doll drove it from there to the Roadway Inn where he picked up Loop who was carrying "folded material". (Stip p. 8) Loop and Doll drove the Pontiac station wagon back to the Sheraton. The red Ford, driven by Bonilla, arrived at the Sheraton. (Stip p. 9) Later, Harney was checking out of the Roadway, while at the Sheraton, Doll and Loop drove the Pontiac station wagon to the Roadway Inn. (Stip p. 9).

Harney and Doll were observed

together in a room at the Roadway. Later, Loop and Doll drove the Pontiac station wagon away from the Roadway Inn. (Stip p. 10) Bowen then took a canvas bag out of the van, which was already parked outside the Roadway Inn, and walked into the Roadway's underground garage with it. He walked out of the garage carrying the same bag and an additional bag. Harney was walking with him. They put the blue bag into the van and then walked back into the garage. (Stip pp. 10-11) Bowen, Harney and Bonilla were observed in the garage next to the red Ford with its trunk opened. (Stip p. 12) The brown Torino then was driven away from the parking lot, by whom we do not know. Bowen then drove the red Ford out of the garage with Bonilla and Harney as

passengers. They went to a restaurant. (Stip p. 12) While they were eating, narcotics agents searched rooms 509-518 at the Roadway Inn and a narcotics detective dog "alerted" to narcotics indicating that at some indeterminable time in the past some kind of controlled substance had been in the room. (Stip p. 13).

Bowen, Harney and Bonilla left the restaurant and drove to the Sheraton in the red Ford. A short time later, they left the Sheraton and drove to another restaurant where they met Loop and Larsson. Bowen, Bonilla and Loop got back into the red Ford. Harney and Larsson got into the brown Torino. Both vehicles drove away. (Stip p. 14)

The Torino drove to a restaurant

where Harney and Larsson ate. The red Ford was driven to the Roadway Inn where Bowen, Bonilla and Loop parked it near the van. They then took three bags out of the red Ford and put them in the van. They then drove both vehicles to Hertz where Bonilla returned the red Ford. All three then got in the van and drove northward on Interstate 5. (Stip pp. 14-15).

In the meantime, Harney and Larsson left the restaurant and drove in the Torino to Sea World where they spent an hour or so. (Stip p. 15)

The van was stopped without a warrant by narcotics agents at the U.S. Border Patrol checkpoint at San Onofre. (Stip p. 15)

The actual stopping of the van was

accomplished by six armed officers, three of who were in uniform, surrounding the van and with one of them, with his gun drawn and badge displayed, ordering the van to pull over. When the van came to a stop, the occupants (Bowen, Bonilla and a third individual) were ordered out. When the door was opened, the agents detected an odor of marijuana inside. The agents radioed instruction to the surveillance unit that was following Larsson and Harney to stop them. Bowen, Loop and Bonilla were arrested without warrants and the van was seized, but not yet searched. By then, Harney and Larsson had left Sea World and were driving in downtown San Diego. The agents, undetected, followed close behind. When the agents learned that an

odor of marijuana had been detected in the van at San Onofre, Harney and Larsson were stopped and arrested. (RT pp. 69, 120)

During the next several hours, Larsson gave statements which were used in affidavits supporting search warrants for the van (which was still at San Onofre), the vessel Andiamo, and Harney's hotel room. (RT 123) In the van were found several pounds of marijuana and on the Andiamo more marijuana was found. The Larsson statement inculpated Harney as the importer of the marijuana. (Stip pp. 18-22)

Harney's motions to suppress were granted by the District Court on October 5, 1983 with certain critical exceptions. (The government did not appeal from any

grant of a motion to suppress.)

The District Court held that the warrantless stop of the van at San Onofre was an illegal seizure because it lacked probable cause. It also held that Harney had standing to raise this issue and granted his motion to suppress the fruits of the seizure, the principal fruit of that seizure being the odor of marijuana that was detected.

The fruits of the Larsson arrest, i.e. Larsson's confession (inculpating Harney), which led to the search warrants for the van and for Harney's vessel, which led to the seizure of the marijuana, were admitted into evidence. The District Court held that the Larsson arrest was not connected to the stopping of the van and, therefore, that even

though Harney had standing to challenge the fruits of the van stop, it would do him no good because Larsson's arrest did not flow from the van stop. The District Court refused to address the issue of the legality of Larsson's arrest on two bases: 1) because Larsson, who was cooperating with authorities and had reached a negotiated disposition, did not raise it; and, 2) because Harney did not have "standing" to raise it. Since Harney, the District Court held, had no standing to challenge Larsson's arrest on any other grounds, the search warrants were upheld.

The Ninth Circuit disapproved of the District Court's reasoning but affirmed the result, holding that the van stop and the Larsson/Harney stop were each

justifiable under Terry v. Ohio, 392 U.S. 1 (1968)

REASONS FOR GRANTING THE PETITION

The Court of Appeals' incorrectly applied the principles of Terry v. Ohio, 392 U.S. 1 (1968) and United States v. Sharpe, -- U.S. --, 84 L.Ed.2d 605 (1985).

In Sharpe, the parameters of a Terry stop were clarified as having two essential characteristics: (1) the stop must be justified at its inception; and (2) the scope of that stop must be reasonably related to the facts that are given to justify the stop in the first instance. Sharpe, supra, at -- U.S. -- , 84 L.Ed.2d 613. Sharpe also reaffirmed the requirements set down in Florida v. Royer, 460 U.S. 491 (1983) and United

States v. Place, 462 U.S. 696 (1983) that the stop must be so "minimally intrusive as to be justifiable on reasonable suspicion". Sharpe, supra, at -- U.S. --, 84 L.Ed.2d 615, quoting United States v. Place, supra, at 462 U.S. 709.

In the instant case the court of appeals held that the detention of the van satisfied the requirements of a Terry stop because the search of the hotel room indicated (through the alerting of a narcotics detection dog) that the room, at some point, contained marijuana. (See, App. A, infra, 5) The Court of Appeals also held that the "concerted" activity of all of the suspects would in itself have justified a Terry stop of any of the suspects wherever they were found. Ibid. Both of these points

incorrectly apply the rules relating to a Terry stop and ignore the evidence. Assuming, arguendo, that the search of the room yielded founded suspicion for a Terry stop of the van and Larsson/Harney, what actually occurred were arrests, not Terry stops. Thus, thoses arrests were illegal inasmuch as the room did not yield probable cause.

Far from being the minimally intrusive detention contemplated by United States v. Place, supra, the stop in this case was a full-fledged arrest.

The record demonstrates that the defendants were under arrest at the time Agent Cooper ordered the van to the roadside. The decision to arrest and the arrangements for the arrest were made prior to the actual physical stop of the

van. Agent Cooper arranged for four vehicles to follow the van to the checkpoint. (RT 63) He had radioed ahead for the Border Patrol "to stop it for us and assist us in the detention of the van," (RT 64) and 30 minutes before the stop of the van he had directed the agents who were assigned to Smith, Mangam and Doll that "if anyone tries to get on a flight, take them and detain them at the airport." (RT 108)

The actual stop of the van took place with six armed officers, three in uniform, surrounding the van. Cooper led the group, and with gun drawn and badge displayed, ordered the van to pull over. In determining whether this "detention" was a Terry stop for investigative purposes, one need only refer to Agent

Cooper's own words regarding the purpose of stopping the van:

> "As far as I was concerned, the investigation was concluded. A narcotics transaction had occurred . . ."

RT 65, 11. 13-15

Accordingly, at the time that the van was surrounded by six armed officers and ordered to the side of the road at gunpoint, a reasonable person would have felt that he was not free to simply drive away. The suspects were arrested at that moment.

Thus, the intrusion, at its inception, was maximum instead of minimum. The officers did not intend merely to stop a citizen to make inquiries concerning a situation that was thought to be suspicious; the testimony indicates that the agents felt that a narcotics transaction had been consummated and that they were conducting a "round up of the entire gang". (See: District Court Opinion, App. B, infra 7) The officers never intended to "detain" the suspects for a brief time - the intent was to arrest them and to hold them in custody indefinitely.

The duration of the detention of the van and its occupants is not an issue in this case because the odor was discovered

very shortly after the stop was effected. This is not a case where the "brevity" requirement of a Terry stop is at issue. C.f. United States v. Sharpe, supra. The issue is the nature of the stop at its inception - the first of the two pronged tests under Terry and its progeny. Here, the detention of the van simply was not a "stop" - it was, at its inception, as much an arrest as a detention could possibly be. The fact that the unlawful arrest (i.e., the purported Terry "stop") eventually yielded probable cause for an arrest can not be used to retroactively cure the initial illegality of the arrest.

The court of appeals also held that the detention of Larsson and Harney in downtown San Diego was itself a Terry

stop justifiable independently of the fruits of the stop of the van. (See Memorandum Opinion, App. A, infra 5) This holding is unsupported by the record which disclosed no basis for a founded suspicion that Harney or Larsson had engaged in criminal activity.

The testimony of the agents and the stipulated facts are devoid of any reference to any observation or evidence of Larsson's activity--or even his existence--until Bowen, Bonilla and Harney drove the red Ford from the Sheraton to Humphrey's restaurant at the end of the "transaction":

> "A. (Agent) We followed the red vehicle which contained Mr. Bowen, Harney, and Bonilla from

the Sheraton Hotel to the Humphrey's restaurant located on Shelter Island.

Q. What did you observe happen at that location?

A. As I was parked directly across the street in a parking lot, I observed them walk to the Humphrey's restaurant and were met by Mr. Loop and another subject later identified as Hans Larsson.

Q. Hans Larsson, for the reporter, Hans, H-A-N-S, Larsson, L-A-R-S-S-O-N; is that correct?

A. Yes, it is.

RT 52, ll. 6-16.

This is the first time that Larsson entered the picture.

Larsson, Harney, and the others were at Humphrey's 10 minutes and were observed to be 'laughing' and 'shaking hands'.

Then they left. Harney, with Larsson as a passenger, drove the brown Torino to a Kentucky Fried Chicken and ate lunch. From there they went to Sea World and spent an hour. As they drove away from Sea World through downtown San Diego, the agent who was following them received word that Bowen, Bonilla and Loop and the

van were in custody at San Onofre and that the van contained an odor of marijuana. Larsson and Harney then were arrested.

The evidence also failed to support a founded suspicion as to Harney himself.

During the evening of June 9, 1983, Agent Williams learned that one Thomas Harney had rented rooms 509 and 512 at the Roadway Inn. (RT 28-29) The following morning Agent Williams ran a "NADDIS" check which reportedly disclosed that Harney, among whose DMV addresses was the vessel Andiamo, was "of record with the D.E.A. as being associated with narcotics violators." (RT 29-30)

Harney was first seen by the agents on the morning of June 10, 1983, when he and Dean Bowen walked into the lobby of

the Roadway Inn, where Harney was overheard telling a clerk that he was checking out of room 509 and 512. (RT 34-36) Later he was seen "standing" in room 509 with several other people (RT 37), and still later he was observed walking out of the hotel's underground garage with Bowen. At this time Bowen carried a blue bag which he put into a grey Ford Van. Bowen then closed the van door, and he and Harney walked back into the underground garage. (RT 39-41)

Shortly after these observations a Ford Torino departed this underground garage (RT 42), and then a red Ford driven by Bowen and bearing as passengers Harney and Jamie Bonilla. (RT 44) This red Ford was followed to Humphrey's restaurant where its occupants met with

Robert Loop and Hans Larsson. (RT 51-52) After about ten minutes this group broke up. Harney and Larsson drove away in the Ford Torino, while Bowen, Loop and Bonilla left in the red Ford. (RT 52)

These are essentially all the facts adduced at the hearing concerning the agents' observations of Harney prior to his arrest in downtown San Diego on the afternoon of June 16. The other three men returned to the red Ford and proceeded north on Interstate 5 in the grey Ford Van, until they were stopped at the San Onofre checkpoint.

Thus, the detention of Larsson and Harney can not be justified as a Terry stop either on the basis of the fruits of the van stop or on the facts known to the officers independently of the van stop.

CONCLUSION

For all of the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

JERROLD M. LADAR
Attorney for Petitioner
THOMAS E. HARNEY

June, 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 84-5031
DC No. CR 83-0584-GT

United States of America,
Plaintiff-Appellee,

v.

Dean Edward Bowen,
Defendant-Appellant.

No. 84-5032
DC No. CR 83-0584-GT

United States of America,
Plaintiff-Appellee,

v.

Jaime Bonilla,
Defendant-Appellant.

No. 84-5033
DC No. CR 83-0584-GT

United States of America,
Plaintiff-Appellee,

v.

Thomas Edward Harney,
Defendant-Appellant.

Argued and Submitted February 6, 1985

File Dated April 23, 1985

Appeal from United States District Court
for Southern District of California

Before GOODWIN, REINHARDT and WIGGINS,
Circuit Judges.

MEMORANDUM 1/

Defendants appeal their convictions

1. The panel has concluded that the issues presented by this appeal do not meet the standard set by Rule 21 of the rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit except as provided in Rule 21(c).

for conspiracy to possess marijuana. They challenge their arrest, the seizure of the van in which two of them were riding and evidence discovered under a later-obtained search warrant. After a motion to suppress was denied, judgment was entered on stipulated facts. We affirm. The obtaining of the search warrant, the investigative stop, the arrest, and the seizure of two of the defendants and their van were all proper.

Beginning on June 9, 1983, federal narcotics agents conducted surveillance of the activities of four individuals seen at the San Diego airport. Officials watched as these individuals rented cars, checked into several different hotels, ate at San Diego area restaurants and conducted their business with other persons. Among the hotel rooms under

surveillance were two which had been rented on June 8, 1983, by defendant Harney, into which agents saw Harney and defendant Bowen enter and leave. Among the vehicles under surveillance was a Ford van which Harney rented on June 7, 1983, in which agents observed defendants Bowen and Bonilla as driver and passenger, respectively.

The activities of the individuals under surveillance strongly suggested to the agents that a narcotics transaction had occurred on June 10, 1983. After two of the suspects had checked out of their hotel rooms, law enforcement officers entered with the consent of the proprietors and conducted a dog-sniff of the premises. The dog alerted. A small amount of narcotic residue or material was found in one of the rooms. Agents

followed the Ford van as it left San Diego and headed north on Interstate 5. As the van approached the San Clemente border patrol checkpoint, the agents in San Diego radioed to border patrol agents at the check point to stop the van. Seven officers, one holding a gun he had withdrawn from its holster, stopped the vehicle at the checkpoint. After identifying themselves as engaged in a narcotics investigation, the officers asked the three occupants to exit the vehicle. When the van door opened, the officers observed deodorizers on the inside of the van. One agent telephoned other agents in San Diego and reported his discovery of the odor. He advised other units to arrest or stop any of the other individuals who had been under surveillance if they attempted to leave

San Diego. Defendants, Bowen, Bonilla and a third person, the occupants of the van, were placed in a holding cell at the checkpoint where they were held until the officers obtained an arrest warrant and a search warrant for the van. When they eventually executed the search warrant, officers discovered 1,115 pounds of marijuana.

Meanwhile, other narcotics agents had stopped and arrested defendant Harney and one Hans Larsson as they drove through San Diego in one of the cars under surveillance. Larsson provided agents with information leading to the discovery of a boat containing 3,000 pounds of marijuana. The information was also used in connection with obtaining the search warrant for the van.

The question in this case is whether

the stop of the van in which defendants Bowen and Bonilla were traveling was lawful and whether the evidence gathered from that stop and from statements made by Larsson after his arrest could be used as evidence against the three defendants.

Both the government and the defendants claim too much from the facts in this case. The government claims that because the stop of the van was made at an immigration checkpoint, the narcotics officers did not need even a well-founded suspicion to make the stop. This is simply not the law. The defendants claim that because seven government agents were involved and one displayed a weapon when stopping the van, the stop constituted an illegal arrest, ab initio, and the "illegal arrest" tainted all the evidence subsequently discovered. Both parties

are wrong, and their industry in pressing error upon the trial court compounded some of the confusion in this case.

The evidence of narcotics in the vacated rooms was sufficient to constitute a justifiable suspicion of criminal activity to validate a Terry stop, at least as to the occupants of the room. The concerted activities of all was sufficient to extend a Terry-stop investigation to all eight persons, wherever they were found.

The first stop, at San Clemente, was a lawful Terry stop. The underlying justification for a Terry stop, to permit limited investigation of suspicious circumstances, was clearly present. See United States v. Sharpe, --U.S.--, 53 U.S.L.W. 4346 (March 20, 1985).

The "odors" of marijuana emanating from the van were the fruits of the lawful Terry stop. The "odors" not only confirmed the officers in their well-founded suspicion, but also gave rise to probable cause to arrest the occupants of the van, as well as probable cause to arrest the other two suspects in San Diego. See United States v. Leazar, 460 F.2d 982, 984 (9th Cir. 1972).

Thus, the "seizure" of the van was lawful when first made. All arrests made thereafter were based on probable cause and were lawful. The occupants of the van were held in detention for approximately nine hours while the officers sought a warrant for their arrest and a search warrant for the van. The detention in this case may have

exceeded that which is permissible incidental to a Terry stop. If so, the occupants of the van were subject to de facto arrests immediately after the van was seized. Probable cause was present, making the de facto arrests lawful notwithstanding the belief of the officers that a warrant was necessary.

A search warrant was ultimately procured, and a search of the van pursuant to the warrant produced the inevitable discovery of the contents of the van. Because the arrest of Larsson was lawful, his post-arrest statements to support the search warrant were proper for that purpose and the warrant was sufficient to authorize the search of the van an hour later or nine hours later. Therefore, the motion to suppress was properly denied.

While the trial court might have ruled differently in fixing the time when Bowen and Bonilla were arrested, and in dealing with the questions of the stopping of the van and standing to object to the stop, the court committed no error in refusing to suppress any of the evidence. We therefore affirm the judgment.

APPENDIX B

Criminal No. 83-00584-GT

United States District Court
Southern District of California

United States of America, Plaintiff,

v.

Thomas Edward Harney, et al.,
Defendants.

ORDER

This matter came on for a full hearing on August 16, 1983. On September 27, 1983, this court ruled on all of defendants' motions including those respecting suppression of evidence and of statements. Due to the complexity of certain suppression motions, the court gave the parties only its rulings during the last hearing and stated that reasons would be provided in a written order. We

now address, therefore, issues raised by the Government's seizure of the van, ship, and individual defendants.

With respect to the seizure of the van at the San Onofre checkpoint, the issue presented is whether an arrest or merely a stop took place. This requires an evaluation of all of the surrounding circumstances. The most critical consideration is whether a defendant was "free to choose between terminating or continuing the encounter with the law enforcement officers." United States v. Johnson, 626 F.2d 753 (9th Cir. 1980), aff'd 102 S.Ct. 2579 (1982); United States v. Beck, 598 F.2d 497 (9th Cir. 1979). Agent Cooper testified that he and six officers, three of whom were in uniform, surrounded the van when it stopped at the checkpoint. Agent

Cooper's gun was drawn and visible to defendants as was his badge. Defendants were "detained" in a holding area at the checkpoint for about eight hours. It should also be noted that Agent Cooper had decided to stop the van long before reaching the checkpoint believing that his narcotics investigation had ended. (RT 65) He had radioed other units to "detain" the remaining defendants and had summoned a narcotics detection dog. In view of these circumstances, this court concludes that an arrest took place at the San Onofre checkpoint.

Although the Government produced a great deal of testimony concerning defendants' conduct in the days preceding the arrest at the checkpoint, this court cannot find the requisite probable cause for this seizure. During the course of

surveillance, the Government agents observed nothing that could give rise to anything but the vaguest of suspicions. That the narcotics detection dog alerted to the presence of a controlled substance at some moment in the past in a room previously occupied by certain defendants must be largely discounted by the court because there is no way of knowing what substance was in the room and when it was there. Similarly, the inclusion of several of the defendants' names in the NADDIS system is virtually meaningless because any authorized agent can put a name in for whatever reason the individual agent deems adequate. In short, the Government lacked, at the time of the arrest, anything that could give criminal character to an otherwise innocuous situation such that a

reasonable person would believe a felony was being committed.

Turning then to the question of standing, it is axiomatic that a court may not exclude evidence under the Fourth Amendment unless the challenged conduct violated the legitimate expectation of privacy of the challenging defendant rather than of a third party. United States v. Payner, 447 U.S. 727 (1980). While in the past courts focused upon both defendant's property interest and privacy interest to resolve standing issues, the Supreme Court now examines primarily only the privacy interest. Rakas v. Illinois, 439 U.S. 128 (1978). With this in mind, we consider who among Bowen (the driver), Harney (the renter), Loop and Bonilla (the passengers), had a legitimate privacy interest in the van at

the time it was seized.

Harney had left a $1,000.00 deposit with the rental agency as a deposit on the van. He submitted a declaration stating that he had permitted Bowen to use the van for a specific trip and that he expected to have it returned to him. Harney also asserts a property interest in the area searched by virtue of the presence of certain sailing equipment in the van. This equipment was allegedly to be delivered on Harney's behalf to Seal Beach. Unlike the defendant in United States v. Culbert, 595 F.2d 481 (9th Cir. 1979) who had abandoned a rental vehicle and was not present when it was searched, Harney apparently did not intend to abandon the van. This court concludes that Harney had a reasonable expectation of privacy in the van at the

time of its seizure.

In Harney's August 15, 1983 declaration, he states that Bowen had his permission to drive the van. When the van was stopped, Bowen was in fact the driver. Under United States v. Portillo, 633 F.2d 1313, 1317 (9th Cir. 1980), cert. denied, 450 U.S. 1043 (1981), Bowen has standing to challenge the van's seizure because he had been given the keys with the authorization to drive the vehicle.

The court in United States v. Perez, 689 F.2d 1336 (1982), distinguished its facts from those in Rakas by noting that Rakas "involved mere passengers in a car who asserted no proprietary or possessory interest in the car or in the property seized." In Perez, on the other hand, defendants

asserted both of those interests. It is this court's judgment, based upon a careful review of all the facts, that Loop and Bonilla fall within the rule in Rakas because they have no interest in the van or in the property seized. In reaching this factual determination, the court has weighed Harney's August 15, 1983 declaration and his contradictory September 29, 1983 declaration which was submitted after the court's ruling. The court is satisfied that the Ninth Circuit does not intend standing to be conferred by self-serving declarations that find no support in the facts adduced through testimony. Thus, only Harney and Bowen have standing to challenge the seizure of the van.

Each seized defendant does, of course, have standing to challenge his

own arrest. Because there was no probably cause for the arrests of Bowen, Loop and Bonilla at the moment the van was seized at San Onofre, any statements made subsequent to arrest must be suppressed as to the speaker. Dunaway v. New York, 442 U.S. 200 (1979).

The seizures of Harney and Larsson in downtown San Diego by four officers shortly after the seizure of the van raises complicated Fourth Amendment issues. We hold at the outset, that these seizures constituted arrests rather than stops. The Government concedes as much in its September 19, 1983 submission stating that Harney's seizure must be supported by probable cause. Harney's arrest was not supported by probable cause because the smell of marijuana, which would provide the basis for

probable cause, must be suppressed as to Harney because he has standing to challenge the seizure of the van. Larsson, on the other hand, has no such standing. The court determines that the odor, which Agent Cooper identified as marijuana's scent, when taken in conjunction with all of the activities the agents observed, provides probable cause for Larsson's arrest.

The critical issue arising from this arrest is whether the seizure of Larsson and of his subsequent statements constituted a fruit of the illegal seizure of the van. Because Harney has standing to challenge the van's seizure, he is in a position to challenge everything that flows from that seizure which is not specifically exempted from the fruit of the poisonous tree doctrine.

In this instance, Harney challenges the search warrant that was issued upon probable cause furnished primarily by Larsson's post-arrest statements. In analyzing this issue, it must be noted at the outset that this is not an issue of probable cause for Larsson's arrest. Larsson's statements, whether seized legally or illegally, are not normally subject to Fourth Amendment challenge by a third party. United States v. Payner, supra. The issue is, rather, whether the seizure of the van was the direct or indirect cause of the seizure of Larsson. Wong Sun v. United States, 371 U.S. 471 (1963).

The court has carefully considered this causation issue and has determined that there is no factual nexus between the seizure of the van and the seizure of

Larsson. As such, the fruit of the poisonous tree doctrine does not come into play. United States v. Allard, 600 F.2d 1301, 1305 (9th Cir. 1979); United States v. Corral-Martinez, 592 F.2d 263, 266 (5th Cir. 1979). The record makes very clear that the seizure of Larsson was independent of the seizure of the van. Agent Cooper had assigned other agents to follow the two other groups of defendants. These agents had authority to arrest defendants if they attempted to leave town. (RT 108) Well before the seizure of the van, Agent Cooper determined that the investigation was over. (RT 65, 75) Under these circumstances, the court finds as a factual matter that a rounding up of the entire gang was underway. Although Agent Cooper as leader of the investigation may

well have wished to seize the van carrying the marijuana as the first step in his roundup, there can be no doubt that all defendants were to be arrested regardless of what transpired at the moment the van was seized. That the van was in fact seized first was a fortuitous circumstance. A defendant in town, for example, could have been the first arrested had he attempted to leave town. Thus, this court finds no link between the van's and Larsson's seizures which could raise the issue of the poisoned fruit doctrine. The result would of course be very different if there had been no ongoing investigation and no arrests would have occurred but for the van's seizure.

Because there is no direct or indirect cause and effect relationship

between the two searches, the court need not reach the issue of whether the inevitable discovery rule would apply to evidence that would inevitably be seized by an illegal search. We conclude, therefore, that Harney has no standing to challenge the arrest of Larsson. The warrant, issued in strong reliance upon Larsson's statements, is not, therefore, subject to challenge by defendant Harney or by any co-defendant.

IT IS SO ORDERED.

DATED: OCTOBER 4, 1983

GORDON THOMPSON, JR., Judge
United States District Court

APPENDIX C

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF CALIFORNIA

Criminal Case No. 83-0584-GT

United States of America, Plaintiff,

v.

Thomas Edward Harney (1),
Jamie Marquez Bonilla (2),
Dean Edward Bowen (3),
Robert Joseph Loop (4),
Defendants.

STIPULATION

IT IS HEREBY STIPULATED and agreed by and between the plaintiff, UNITED STATES OF AMERICA, through its counsel of record, Peter K. Nunez, United States Attorney, and Robert E. May, Assistant United States Attorney, and the defendants Thomas Edward Harney, Jamie Marquez Bonilla, Dean Edward Bowen and Robert Joseph Loop, through their

respective attorneys of records, William Osterhoudt, Marcus Topel, Cristina Arguedas, and Paul Wolf, that if prosecution witnesses were called they would testify, if such testimony was deemed admissible over any applicable defense objections, as follows:

1. On June 9, 1983, at approximately 3:30 p.m., Agents Phil Cooper and Robert Williams, of the Narcotics Task Force, observed four individuals, later identified as Robert Loop, Leo Mangan, Bruce Doll and William Smith walking together from the PSA area of the San Diego International Airport Terminal. The subjects walked from the sidewalk in front of the terminal to a cement island in the middle of the adjacent roadway and stood there talking to each other. Two of the subjects

carried soft-sided athletic bags. The men walked to the island. When they got to the island it appeared as though they were going to take a city bus because they were standing next to a bus stop; however, when the Hertz shuttle bus stopped in front of them, all four subjects boarded the bus to be driven to the Hertz rental office, located near the West Terminal of the airport.

2. Agents Cooper and Williams decided to follow the suspects and recruited the assistance of Agent Ashcraft. All three agents ran to their vehicles located at the east end of the East terminal and drove to the Hertz rental office where they observed the four subjects exiting the bus and entering the Hertz office. Agent Ashcraft went into the office and

observed Doll and Smith at the counter talking with a Hertz employee. Agent Ashcraft observed that Doll did the majority of the talking to the employee. doll had a prepaid rental of a vehicle; however, he did not possess the correct identification, credit cards, did not qualify to rent the vehicle and the car rental employee refused to give Doll a vehicle. Before Doll left the counter, Doll stated to the employee that he was a student and had no identification. Before the four persons left the Hertz office, Smith told the others that he was going to a pay phone to tell "Pat" of the delay in getting the rental vehicle. Agent Ashcraft reports that Smith used numerous coins to make an apparent long distance phone call. While all the subjects were still standing inside the

car rental office, Agent Ashcraft overheard Doll asking Loop if Loop had a car, and Loop stated, "No, not anymore."

3. The subjects were observed by the agents to exit the Hertz office and to enter another Hertz shuttle bus and to return to the front of the East Terminal.

4. At approximately 4:00 p.m., the four subjects entered taxi cab number 846, identified as "My Cab", which drove them to the Rodeway Inn located at 2901 Nimitz Boulevard, San Diego, California. All four persons exited the taxi cab and entered the front door of the Rodeway Inn and disappeared from the agents' sight.

5. Within one or two minutes, Agents Cooper and Williams went into the lobby of the hotel and did not see any of the four persons in the area. After checking the bar and restaurant on the

first floor of the hotel, Agents Cooper and Williams independently checked the six floors by walking the hallways of each floor. Agent Cooper checked the odd number floors and Agent Williams checked the even numbers.

6. Shortly after Agent Cooper had walked the entire fifth floor, he entered the elevator which was to be going down. As Agent Cooper was standing in the elevator with the doors opened, he observed Smith enter an elevator which was going up. Agent Cooper's elevator went down and Smith's went up and when Smith's elevator got to the sixth floor and the door opened, Agent Williams was walking by and observed Smith standing inside the elevator. Williams then observed the elevator door close and the elevator go down. Agent Cooper, at this

time, was in the lobby waiting for the other elevator to come down to talk with Agent Williams. Agent Cooper observed Smith arrive at the first floor and watched as he walked to a public telephone located near the bar area of the hotel. Agent Williams then observed Smith hang up the telephone and meet with Doll in the lobby. When Agents Cooper and Williams observed Doll and Smith meeting in the lobby of the hotel, the agents left the hotel and went outside to set up on a surveillance with Agent Ashcraft and other agents in the area.

7. Agents Cooper and Williams then observed Doll, Loop, Smith, and Mangan exit the hotel and enter Red Cab #611. They proceeded directly to the Sheraton Harbor Island Inn where they exited the taxi cab and entered the hotel's main

lobby.

8. After they entered the hotel, Assistant Special Agent in Charge T.J. Angioletti went to the hotel registration desk and observed Doll obtaining hotel rooms 1043 and 1045. The conversation indicated it would be for more than one night. doll requesting the best view of the harbor and eventually paid $225.00 for both rooms per night. Additional information given by Bruce Doll when he rented rooms 1043 and 1045 was his address of 101 Granlee, San Rafael, California 94903, his California driver's license number C0766217, and a date of birth of April 16, 1954.

9. Shortly after 5:00 p.m., Smith exited the Sheraton Hotel and entered an Ajax Rental Car shuttle bus which drove Smith to the Ajax rental office located

in the 1500 block of Kettner Boulevard. At that location Smith rented a brown Pontiac station wagon with California license 1BTY476 and drove it back to the Sheraton Hotel where he arrived at approximately 5:30 p.m. Sergeant Gritton went to the Ajax Rent-A-Car office and learned that Smith gave an address of 1011 N.E. 6th Street in Ft. Lauderdale, Florida. Smith also gave telephone numbers (305) 525-6415 and (305) 522-7916.

10. At approximately 8:00 p.m., arrangements were made for the Narcotic Task Force agents to acquire room 1046 located down the hall from 1043 and 1045. Agent Mitchell was assigned to conduct a surveillance from that room and while in route to that room, he observed Loop and a Latin male resembling Jamie Bonilla

standing at the entrance of the elevator on the 10th floor. When Agent Mitchell went to room 1046, he was unable to open the door with the key given him by Agent Cooper. Agent Mitchell then had to return to the parking lot where Agent Cooper was to obtain another room key. After retrieving the key Agent Mitchell went back to the elevator to go to the 10th floor and again saw Loop, who at that time was carrying a paper bag, and who was also going up to the 10th floor. Both Agent Mitchell and Loop took the up elevator and when they arrived on the 10th floor, Agent Mitchell observed Loop enter room 1043.

11. It was determined by Agent Mitchell that the room he was in was inadequate for a surveillance room and at that time Agent Dalton was sent to the

surveillance room to discuss the situation with Agent Mitchell. When Agent Dalton exited the elevator on the 10th floor, he observed Loop exiting room 1043 and closing the door. Loop then walked toward Agent Dalton who was standing in the alcove area of the elevators. At that point Agent Dalton made a comment to Loop regarding the nice view from the window of the hotel on the 10th floor. Agent Dalton remained in the alcove area knowing that Loop was in front of the elevator door. Loop, however, did not answer or make any statement to Agent Dalton, and just continued looking at Agent Dalton. Even after the elevator doors were open for Loop to enter the elevator, Loop continued staring at Agent Dalton. Loop then entered the elevator and went down.

12. Agent Dalton then went to room 1046 and after meeting with Agent Mitchell, Agent Dalton returned to the elevator, went down to the main floor to the lobby area and checked the lounge and restaurant. Agent Dalton then went to the registration desk to contact the night manager of the hotel. At this time, Dalton observed Smith enter the front door of the hotel and as he was passing Agent Dalton, Smith stared at Agent Dalton. Smith then scanned the hotel lobby prior to walking toward the direction of the elevator which services the win containing rooms 1043 and 1045.

13. Agent Williams determined from the registration cards at the Rodeway Inn that a person identified as Thomas Harney had rented rooms number 509 and 512 on June 8, 1983, and a person identified as

William Henrickson had rented room number 518 on June 8, 1983. It was learned that Harney listed a residence in Sausalito, California and that Henrickson listed a residence at 2319 Millcreek Lane, Healdsburg, California.

14. On June 9, 1983 at 1:17 p.m., a telephone message was left for room 518 at the Rodeway Inn stating "while you were out Bruce telephoned with the message 'flight has been delayed for an hour'". On June 9, 1983 at 8:45 p.m., a telephone message was left for room 518 at the Rodeway Inn, that, "Jamie" had called.

15. At about 10:20 p.m., Agent Cooper and other agents observed Smith and Loop exit the Sheraton Hotel, get into the brown Pontiac station wagon and drive to Harbor Island Drive to make

their exit from the hotel parking lot. Smith was driving the vehicle and Loop was the passenger in the right front seat. As the vehicle drove onto Harbor Island Drive, Agents Williams and Cooper observed Loop to fully turn around in the front seat and for approximately 15 seconds look directly in back of him. Agent Cooper was in a vehicle directly to the rear of the vehicle in which Smith and Loop were riding. The vehicle continued to the Rodeway Inn where the vehicle was parked in an underground parking facility underneath the hotel itself. Surveillance concluded at 11:30 p.m. on June 9, 1983.

16. On June 10, 1983, at approximately 6:00 a.m., the same agents conducting the surveillance on June 9th, resumed their surveillance at the

Sheraton Harbor Island Inn. The brown Pontiac station wagon, driven by Smith and Loop the previous night and parked in the underground parking facility of the Rodeway Inn, was now parked at the Sheraton Hotel's parking lot.

17. At approximately 10:15 a.m., Agent Cooper observed Doll exit the front of the Sheraton Hotel and walk almost directly in front of the brown Pontiac station wagon parked in the parking lot. Doll walked several steps past the vehicle and stopped, scanned the entire parking lot and then looked up in the direction of rooms 1042 and 1045. Doll then turned around and walked directly to the brown Pontiac station wagon which he entered and drove from the hotel parking lot directly to the Rodeway Inn in Point Loma. Doll parked the vehicle directly

in front of the hotel, and after going into the hotel, he returned at 10:25 a.m. with Loop, who was observed carrying folded material with a chamois color to it. The approximate dimensions of the item(s) carried was 12" by 4" by 2". Both Loop and Doll entered the station wagon and drove directly back to the Sheraton Hotel where Agent Cooper observed both to enter the main lobby area. Loop carried the chamois colored item inside the hotel.

18. After the agents followed Doll and Loop back to the Sheraton Hotel, Agent Williams remained at the Rodeway Inn where he observed a red colored Ford automobile, California license number 1GBZ202, driven by Jamie Bonilla, drive onto the outside hotel parking lot in a very fast manner and then drive down into

the underground hotel parking lot. This red Ford was leased on June 8, 1983, by Jamie Bonilla, from Hertz Corporation at Lindberg Field.

19. At approximately 11:00 a.m., Agent Williams was in the parking lot of the Rodeway Inn and followed Thomas Harney and Dean Bowen into the lobby. Bowen continued walking through the lobby to an elevator where he was observed to go in an up direction. Harney remained at the check-out desk and was talking with the registration employee while Agent Williams stood next to the desk. The employee stated to Harney, "Are you checking out of rooms 509 and 512?" Harney replied, "Yes", and at this time the employee asked about Harney's other friend in room 518, to which Harney replied, "He will be right down to pay."

20. At 11:15 a.m., Agent Cooper observed Doll and Loop enter the Pontiac station wagon at the Sheraton Hotel and drive directly back to the Rodeway Inn. When Doll and Loop arrived at the Rodeway Inn they parked the vehicle in the outside parking lot in front of the hotel and entered the hotel lobby.

21. Shortly after Doll and Loop walked into the hotel, Agent Williams took the elevator to the fifth floor where he walked by room 509 and observed at least four subjects inside the room including Doll and Harney. After seeing Doll and Harney in the room, Agent Williams walked to the east end of the hotel here he began walking slowly down the fire escape stairs to the first floor. After several minutes, and after arriving at the first floor of the hotel,

Agent Williams walked out the east door of the hotel onto Nimitz Boulevard. At that same time he observed the brown Pontiac station wagon, containing Loop and Doll, driving in a southerly direction from the Rodeway Hotel.

22. At approximately 11:35 a.m., Agents Williams and Ashcraft observed Bowen walk from the hotel lobby to the adjacent parking lot and walk to a 1983 Ford van bearing California license 2E00611. This van was rented on June 7, 1983, for one month by Harney, who left a $1,000.00 deposit with Center City Ford Leasing on Clairemont Mesa Boulevard. After Bowen went to the van, he retrieved a large blue colored canvas bag which appeared to be extremely heavy with large blockish shaped items in the bottom and having what appeared to be a stripped

sheet over the top opening of the bag covering the contents. Bowen walked directly to the underground parking facility rather than back into the lobby. This blue bag was later seized pursuant to a search warrant of the van and contained approximately 24 pounds of marijuana and two stripped sheets. The marijuana was in block form with dimensions ranging from 12" x 18" x 3" down to small pieces.

23. Shortly after Bowen had walked into the garage, he returned to the van carrying a brown leather, or a maroonish colored leather bag along with the same blue colored bag he had earlier carried into the underground parking lot. Accompaning Bowen at this time was Harney. Both walked to the Ford van. With Harney standing next to him, Bowen

opened the side sliding door and placed the blue bag inside the van. After locking the van both subjects then returned to the underground parking lot with the brown bag and out of sight of the agents.

24. Agent Cooper then drove his undercover vehicle into the underground parking lot and observed Bowen and two other individuals standing in back of the red Ford with California license number 1GBZ202. All three subjects were at the red Ford vehicle with the trunk in an open position. When Agent Cooper approached the vehicle in his car, Bowen shut the trunk lid. Agent Cooper took his vehicle approximately eight stalls from the red Ford vehicle and parked. Shortly after Agent Cooper parked his vehicle, a brown Torino, license number

064NCC, drove from the underground parking lot leaving the hotel area. This Torino was leased by Harney from Rent-A-Car, 2975 Pacific Highway, San Diego, California, on June 6, 1983. Agent Cooper waited for several minutes in the underground parking lot, then drove outside the underground parking lot and took up a surveillance point. Approximately five minutes later the red Ford, bearing California license 1GBZ202, came out of the underground parking facility being driven by Bowen and having as passengers, Bonilla and Harney. The Ford left the outside parking lot onto Nimitz Boulevard and drove in a southerly direction to Harbor Drive. The car then made a right turn in a westerly direction and drove slowly to Scott Street where it made a u-turn and drove into the parking

lot of Tarantino's Restaurant. The vehicle was observed by Agent Cooper to park in back of an already parked vehicle. Agent Cooper observed all three subjects remain in the red Ford, looking at passing vehicles. When Agent Cooper drove by, all three subjects appeared to be looking at Agent Cooper. Agent Cooper pulled his vehicle onto a parking lot adjacent to the Tarantino's Restaurant and parked his vehicle between two parked vehicles. Agent Cooper then observed the red Ford driven by Bowen, drive by the entrance which Agent Cooper had just entered and observed all three subjects looking at his vehicles. The red Ford then was driven to the El Torito Restaurant located on Harbor Island and Harney, Bonilla, and Bowen entered the restaurant.

25. While Bowen, Bonilla and Harney were at the El Torito Restaurant, Agent Williams conducted a search of rooms 509, 512, and 518 of the Rodeway Inn. Agent Williams had contacted the owner of the hotel and had received permission to search the rooms, which had been vacated earlier by the occupants. Agent Williams and Customs Agent Iverson, with his narcotic detection dog "Dewey," entered room 509. "Dewey" alerted positively in several spots, which indicated at one time the presence of a controlled substance. Agent Williams, Customs Agent Iverson and "Dewey" went to room 518 where Agent Williams collected two paper bundles, one of which contained cocaine residue, and empty large plastic baggie and several marijuana roach cigarettes. "Dewey" alerted positively for the

presence of a controlled substance on these articles and alerted positively for the presence of controlled substance in the room.

26. At 1:35 p.m., Bowen, Harney and Bonilla exited the El Torito Restaurant, entered the red Ford and drove directly to the Sheraton Hotel where Harney and Bonilla entered. After both Harney and Bonilla walked into the lobby, Agent Vazquez lost sight of them. After Bowen let Bonilla and Harney out of the Ford, he drove the car into the parking lot of the Sheraton Hotel and parked it. Other agents could see two persons on the balcony of room 1043 peering down onto the parking lot as Bowen parked his vehicle. Bowen then walked into the hotel.

27. At 1:55 p.m., Bowen, Harney and

Bonilla exited the Sheraton Hotel, entered the red Ford, and drove to Humphrey's Restaurant on Shelter Island. Bowen, Harney, and Bonilla met with Loop and Hans Larsson. These five persons met for several minutes in front of Humphrey's entry way and stood around conversing, laughing and shaking hands. After the meeting, the five persons were observed to walk to vehicles. Bowen, Bonilla and Loop entered the red Ford. Harney and Larsson entered the brown Torino. Both vehicles drove off of the Humphrey's Restaurant parking lot in tandem and drove east. The Torino, followed by AGents Williams and Manis, drove to the Kentucky Colonel Fried Chicken Restaurant where Harney and Larsson went inside.

28. The red vehicle driven by Bowen

went to the Rodeway Inn Hotel and parked directly to the rear of the Ford van, California license 2E00611. After arriving at the Rodeway Inn and parking behind the van, Agent Ashcraft observed three bags, described as a brown older suitcase, a maroon bag with pockets, and a green and brown bag, taken from the trunk of the red car by Bowen, Loop, and Bonilla and put into the side door of the van. After Bowen locked the van, Agent Ashcraft observed Bonilla re-check the passenger door and the sliding door to make sure the doors were locked. Bowen then entered the driver's side of the van and Bonilla and Loop entered the red Ford. Both vehicles drove from the rodeway Inn parking lot onto Nimitz Drive then south to the San diego Airport where they drove to the Hertz Rent-a-Car

Office. At that location the red Ford, California license 1GBZ202, was returned by Bonilla as the van waited outside the office. After returning the red Ford, bonilla and Loop entered the van and sat in the front area of the van. The van was driven to Interstate 5 and proceeded northbound.

29. The brown torino being surveilled by Agents Manis and Williams was followed to Sea World where Larsson and Harney parked and went inside for at least one and one half hours.

30. The van was followed to the area of the San Onofre U.S. Border Patrol Checkpoint and stopped by Border Patrol Agents and Agent Cooper in the manner described in the transcript of the evidentiary hearing. Agent Cooper went to the driver's door of the van,

identified himself as a narcotic agent, conducting a narcotic investigation, to Bowen, and requesting Bowen, Loop, and Bonilla to exit the van. When Bowen opened the door to the van, Agent Cooper immediately smelled a strong odor of marijuana coming from the inside of the van and at the same time could observe several deodorizers on the inside of the van walls. Agent Cooper would testify that he has seen deodorizers used on other occasions in an attempt to mask the odor of marijuana. approximately 20-30 minutes later, Agent Cooper took Customs Agent Iverson and his narcotic detection dog "Dewey" to the parked and locked van where "Dewey" alerted positively for the presence of a controlled substance within the van by pulling and tugging on the brake light wire at the left rear portion

of the van. A search warrant was obtained and approximately 1,155 pounds of marijuana were seized from the 1983 Ford van on June 11, 1983 at about 1:00 a.m. Also seized upon the execution of the search warrant were the following items among others:

a. Blue canvas bag containing approximately 24 pounds of marijuana in various block sizes and two stripped sheets.

b. Approximately 70 grams of loose marijuana inside a brown suitcase. The suitcase also contained personal affects belonging to Jamie Bonilla.

c. Brown leather valise type bag under the driver's seat which contained, among other things, a document listing Dean Bowen's occupation as a sound engineer with Hun Sound and with a

business address of 647 Erwin, San Rafael, California and telephone number 454-2911 and numerous other documents with the name Dean Bowen.

d. A green and brown canvas bag containing effects of Robert Loop.

31. A search warrant was also obtained for a Swan 55 sailing vessel "ANDIAMO" which was located at Marina Cortez, 1890 Harbor Island Drive. This warrant was executed on June 11, 1983, at approximately 4:00 a.m. and the following items, among others were seized:

a. Approximately 2,986 pounds of marijuana.

b. Numerous charts, maps and logs.

c. Prescription drugs in the name Tom Harney.

d. Receipt number 051297 from the

Marina Cortez showing that on June 10, 1983, a Tom Harney paid $75.00 for three nights docking of the "ANDIAMO" at "B-16".

e. Numerous charter brochures advertising the "ANDIAMO" as available for charter and that Tom Harney was the owner/skipper.

f. Two photographs depicting Thomas Harney in one and Hans Larsson in the other.

g. A passport, in the name of Thomas Edward Harney, III, containing a photograph of Thomas Harney, the defendant named in Case No. 82-0584-GT.

h. Department of Transportation permanent yatch license for the vessel, "ANDIAMO" dated March 9, 1979, in the name of Thomas E. Harney, III© Secretary of Tri-H Corporation.

i. A gun pickup slip numbered

107242 showing the name Tom Harney, 647 Erwin Street.

j. A COD tag from Heathkit Electronics Center to a T. Harney, 647 Erwin St., San Rafael, California.

k. One Jartran rental agreement numbered 60331271 showing that a Thomas E. Harney of the Southwest Dock Club, vessel ANDIAMO, rented a 15 foot truck on June 6, 1983 for $240 cash and returned the truck on June 7, 1983, with 21 miles elapsed on the speedometer.

32. Hans Peter Larsson would testify that:

a. He had left Stockholm, Sweden on November 21, 1982, and had flown to New York. He had spent one night in New York and flew to San Francisco, California. He was in San Francisco for approximately one day when he had taken a bus to Los

Angeles, California and from there, had gone to Mexico camping and just traveling around. He had met Thomas Harney in Panama in February of 1983. He learned Harney was the owner of the vessel "ANDIAMO". Harney had offered him a free ride back to the United States if Larsson would act as deck hand on the boat during the trip. They left Panama on the "Andiamo" on April 29, 1983. Thomas Harney, himself and two Colombian citizens were on the boat. After they left Panama and began to sail in a southerly direction, instead of a northerly direction, he confronted Harney and asked where they were going. At this time Harney told him they were going to Colombia to get a load of "stuff" to take back to the states. When he questioned him at length about it, Harney indicated

they were going to get a load of marijuana to take back to the United States.

b. They sailed the "ANDIAMO" to a point approximately 50 miles south of Buenaventure, Colombia and sailed into a small bay at that location. They docked the vessel near a river bank in the midst of a thick jungle. Approximately 25-30 persons came out of the jungle carrying large bales of marijuana and loaded them onto the boat. He would estimate that approximately 45-50 bales of marijuana were placed on the boat.

c. Larsson would describe the bales of marijuana as weighing approximately 40 kilos, although some were heavier and some were lighter. Each bale was approximately 2-1/2 feet high and 1-1/2 feet square.

d. Larsson, Harney and two

Colombian deck hands sailed from this location on the "ANDIAMO", on approximately May 7th or 8th, 1983. They entered San Diego Harbor on the afternoon of Sunday, June 5, 1983 and docked at an unknown yacht club. He thought the name of the yacht club might be the Southwest Yacht Club, however, he is not certain. On the first night in port, the two Colombian deck hands left the boat and he never saw them again.

e. Larsson would further testify that they remained docked at the first yacht club for three nights and that he remained on board the "ANDIAMO" throughout this time. Harney did sell five bales of the marijuana to an unknown customer on Tuesday, June 7, 1983, sometime before noon on that date. Harney told him to go down into the hold of the "ANDIAMO" and

push up five bales of the marijuana. Harney then loaded these bales onto a push cart and took them somewhere to deliver them to the customer. Harney told him to remain with the ship and that he did not see the person who received these bales of marijuana.

f. They then moved the "ANDIAMO" to an unknown fuel dock located in San Diego Harbor. While they were at this fuel dock, Harney came to the ship and had him help off-load another 5 to 7 bales of marijuana. He went below and pushed the bales of marijuana up on to the deck of the "ANDIAMO" and that Harney then loaded them onto another car and pushed them away from the boat to some other location. Larsson did not see who received these bales of marijuana. After leaving the fuel dock they moved the "ANDIAMO" to

another yacht club that Larsson believes is named the Silver Gate Yacht Club. They remained at this location until the morning of June 10, 1983. Before moving the "ANDIAMO" from the Silver Gate Yacht Club, he assisted Harney with the sales of another 5 to 7 bales of marijuana. This transaction took place early on the morning of June 10, 1983. Harney came to the vessel and instructed him to go down to the hold of the vessel and push approximately 5 to 7 bales up on to the deck. After doing this, Larsson helped Harney load these bales of marijuana on to a push cart and pushed it to a blue van parked in the parking lot of the Silver Gate yacht Club. At this location Larsson met an individual he would identify as Dean Bowen. At this location Dean and Harney loaded the bales of marijuana into

the blue van.

g. Larsson and Harney returned to the "ANDIAMO" and moved it to Marina Cortez on Harbor Island. When they arrived at this location, the blue van was waiting in the parking lot adjacent to the marina. He and Harney again off-loaded another five bales of marijuana onto push carts and pushed them to the parking lot where the blue van was waiting. At this location he was introduced to a person he would identify as Jamie Bonilla. Bonilla was introduced as being named Jimmy. Larsson, Dean, Jamie, and Harney then loaded the second five bales of marijuana into the blue van. While they were doing this, he could see portions of the bales of marijuana from the previous sale still in the back of the van. They were partially covered by sail cloth material

but were visible from outside the van.

h. After concluding this transaction he returned to the "ANDIAMO" and slept for about two hours. Harney returned to the "ANDIAMO" and woke him up, and they went to a nearby shopping center where they bought some clothing. They then returned to Harbor Island to a place known as Humphrey's. At this time Dean, Jamie and a third person unknown, at that time, to Larsson arrived. This person is identified as Robert Loop. Larsson had never seen or met Loop before this occasion. The three persons talked with Harney for about three to four minutes and Larsson was unable to hear the conversation. At this time the three persons were in a bright red vehicle. After this conversation, he and Harney returned to Harney's vehicle, a Ford

Torino, and went to the Kentucky Colonel Fried Chicken Restaurant where they ate lunch. Up until this point, Larsson had spent every night sleeping on the "ANDIAMO". At this time, Harney told him that he hand rented them a room in the hotel near the Marina where the "ANDIAMO" was docked and that they were going to stay three through the weekend and leave for San Francisco the first of the following week. After leaving the Kentucky Colonel Fried Chicken Restaurant, he and Harney drove to Sea World where they spent approximately two hours. After leaving Sea World, Larsson and Harney drove into the downtown San Diego area as Harney was looking for a surplus store located on Market Street. At this time they were stopped by the police and detained. Sgt. Manis after becoming aware

the van had been stopped and contained marijuana stated to Larsson, "The dope is in the van isn't it?", to which Larsson replied "Yes, but some is still on the boat." (RT 120)

i. At approximately 6:30 p.m., Larsson accompanied Sgt. Manis to the Marina Cortez located on Harbor Island near the Travelodge hotel and pointed out the location of the "ANDIAMO' indicating the location of the bales of marijuana on the vessel. He also provided the combination to the lock securing the hatch of the "ANDIAMO". The combination given to the undersigned by Larsson was 1-2-3-4. This combination did open the lock on the hatch on the "ANDIAMO" later during the execution of the search warrant and the location of the marijuana on the "ANDIAMO" was as described by Larsson.

33. Agent Cooper would testify that the packaging of the marijuana seized in the van is the same as the packaging of the marijuana seized aboard the "ANDIAMO".

34. Joseph Riordan would testify that he is a LTJG, on active duty with the United States Coast Guard, assigned to the Regional Task Force, San Diego, California; that he has analyzed the logs, charts, and maps seized from the "ANDIAMO" on June 11, 1983; that based upon analysis, he was able to chart the voyage of the "ANDIAMO" from approximately December 31, 1982, when the vessel left San Diego, until June 5, 1983, when the vessel returned to San Diego. Attached to this stipulation, as Exhibit 1 is a diagram reflecting the voyage of the "ANDIAMO" as prepared by LTJG Riordan.

35. That the items set forth in the

proceeding paragraphs which were in fact seized during the course of the search of the Ford van and the sailing vessel, "ANDIAMO", may be admitted into evidence by reference only. Further, that these items of evidence will be maintained in the custody of the United States Drug Enforcement Administration during the pendency of this law suit.

36. That any factual allegations contained in this stipulation would be established by the testimony of the various witnesses whose live testimony is hereby waived and given up by the defendants.

37. That the hearings heard on August 16, 1983, before this court in Case No. 83-0584-GT is made part of the record for the purposes of trial of the defendants and may be considered by the

trier-of-fact with respect to such trial.

38. That each defendant through himself and through his attorney acknowledges that this stipulation will be sued as evidence. Each defendant expressly recognized that he could be found guilty of the charge contained in the superceding information and the evidence contained herein and expressly recognized that he had the right to:

a. A trial by jury;

b. The assistance of counsel at all stages of the proceedings against him and to have the court appoint and pay the same if he does not have sufficient funds;

c. The right to confront and have his attorney cross-examine all witnesses the government would call to establish the factual material contained herein;

d. The right not to incriminate

himself; and

e. The right to use the subpoena powers of this court to compel the attendance of witnesses.

39. Each defendant by himself and through his attorney expressly:

a. Gives up his right to a jury trial;

b. Acknowledges the assistance of counsel in making decisions in this case;

c. Waives the calling of witnesses to establish the truthfulness of the facts contained herein and thus gives up his right to cross-examine and confront the same;

d. Waives the right to present evidence or witnesses in his own behalf.

40. IT IS FURTHER STIPULATED that this stipulation be entered as evidence in lieu of the testimony of the witnesses

noted herein. Further that the court may review this document prior to November 8, 1983.

41. That this stipulation is being entered into by the defendants for the purpose of preserving, for appellate review, their pretrial motions to suppress evidence.

42. It is stipulated and agreed that defendants may remain out of custody throughout the appellate process on the bails previously set.

DATED:

Respectfully submitted,

PETER K. NUNEZ
United States Attorney

ROBERT E. MAY
Assistant U.S. Attorney

Defendant THOMAS EDWARD HARNEY	WILLIAM OSTERHOUDT Attorney for Defendant HARNEY

Defendant JAMIE MARQUEZ BONILLA	MARCUS S. TOPEL Attorney for Defendant BONILLA
Defendant DEAN EDWARD BOWEN	CRISTINA C. ARGUEDAS Attorney for Defendant BOWEN
Defendant ROBERT JOSEPH LOOP	PAUL D. WOLF Attorney for Defendant LOOP

ORDER

IT IS HEREBY ORDERED that this stipulation be accepted as the testimony and evidence of the witnesses in the case of United States v. Thomas Edward Harney, III, et al., Criminal Case No. 83-0584-GT.

SO ORDERED

DATED:

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UNITED STATES
DISTRICT JUDGE